

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

B6

FILE: EAC 02 153 52219 Office: VERMONT SERVICE CENTER Date: DEC 02 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a masonry contractor. It seeks to employ the beneficiary permanently in the United States as a bricklayer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The AAO concurred with the director's decision on appeal.

On motion, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 16, 2001. The proffered salary as stated on the labor certification is \$22.25 per hour (35 hour week) or \$40,495 per year.

On motion, counsel reiterates his position that the petitioner's bank balances show sufficient cash flow to pay the proffered wage. Counsel states:

BCIS has recently been taking the position that if the evidence shows the net assets of a petitioning employer are in excess of the yearly wage proffered [sic] that is sufficient evidence of the employer's financial ability to pay the proffered [sic] wage. The

evidence as to the net assets of this petition, which the AAO has failed to discuss, is as follows (Schedule L of tax return).

At the beginning of the year its total assets were \$64,291 and no liabilities except loans from "shareholders". We submit that loans from shareholders are not true liabilities; that so called loans by shareholders to their own company are merely their infusion of capital into the company which for accounting purposes are described as "loans". Items 22 thru 27 are not liabilities. It will be noted that items 16 thru 28 are listed under the heading "Liabilities and Shareholder Equity". Item 16 thru 21 reflects the liabilities of the company; item 22 thru 27 reflect the shareholder's equity in the company. When we eliminate the shareholders loans so-called liability, the net assets of the company at the beginning of the year \$64,290; and at the end of the year \$44,065 (\$66,065 less item 24 \$19,555). Using the net assets of a petitioner as proof of petitioner's ability to pay, a criteria laid down by BCIS itself, the evidence does show the net assets of the company to be in excess of the proffered [sic] yearly wage.

AAO has failed to discuss or explain why or how its own decision in matter of X is inapplicable to or is distinguishable from this case. In Matter of X the employers [sic] tax return showed a loss, but its bank statements showed sufficient cash in the bank to pay the proffered [sic] wage, and AAO held that the petition should be approved. The facts of our case are stronger; the tax return does not show a loss; it shows an actual profit of \$22,038 before deduction for depreciation and prior year losses; and its bank statements show a consistent pattern of 4 and 5 figure daily balances available to pay the mid 3 figure wage.

We submit that the AAO's position that the petitioner's "tax return must reflect that the employer generates sufficient net income to cover the offered salary" is erroneous. If the tax return must show that, there can be no reason for 8CFR 204.5 to have been promulgated to permit the introduction of secondary evidence. We submit that 8CFR 204.5 contemplates that even tho [sic] a tax return maynot [sic] show sufficient income, ability to pay can be proved by secondary evidence, such as bank statements. We submit that where the evidence is as strong as that which we have submitted, ability has been established.

*

*

*

... We have argued in our brief that proof that employer has maintained consistent daily bank balances far, far in excess of the proffered [sic] wage, is sufficient to establish its ability to pay said wage. We submit that AAO has failed to address that specific issue; it has erred in its analysis of the evidence; and should vacate its decision and order the petition approved. On the other hand, if AAO's position is that such consistent bank balances are insufficient to establish employers [sic] ability to pay, we are entitled to a ruling on that specific issue with the logic and rationale for same.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. In this case, as noted by the previous AAO decision, the petitioner's taxable income before the net operating loss deduction and other special deductions as reflected on each of the tax returns contained in the record, was far less than the beneficiary's proffered wage of \$40,495.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001 was \$17,810. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel suggests that the petitioner's shareholder's equity should be eliminated when considering the petitioner's financial ability to pay the beneficiary's wage. However, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although loans and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also contends that the petitioner's bank balances establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

Counsel cites a non-precedent decision, *Matter of X*, to support his assertion that the bank balances should be considered when determining the petitioner's ability to pay the proffered wage. However, counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of July 24, 2003 is affirmed. The petition is denied.

prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.